IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5051 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHAIL ENTERPRISES

Versus

OIL AND NATURAL GAS CORPORATION LTD.

Appearance:

1. Special Civil Application No. 5051 of 2001

MR AS VAKIL for Petitioner No. 1

MR RAJNI H MEHTA for Respondent No. 1

..... for Respondent No. 2

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 27/07/2001

C.A.V. JUDGEMENT

1. M/s. Shail Enterprise-petitioner has filed this petition on the ground that Oil and Natural Gas Corporation Limited (hereinafter referred to as `ONGC') has threatened to invoke the Performance Bank Guarantee and has prayed to direct ONGC to return to the petitioner the Performance Bank Guarantee dated 22.2.2000 and also to restrain ONGC, respondent No. 1 or Karur Vysya Bank

Limited, respondent No. 2 from invoking or acting in any manner the Performance Bank Guarantee dated 22.2.2000.

2. The facts giving rise to this petition are as under:

2.1 Respondent No. 1-ONGC published advertisement 7th August, 1999 inviting tender for entering into Annual Rate Contract for supply of 410 Caustic Soda Flakes in question. The quantity mentioned is 410 M.T. of Caustic Soda Flakes. However, it also states that the quantity indicated is the estimated annual requirement. It has been stated that though the annual quantity required was 410 M.T., the bid document mentioned that respondent No. 1 ONGC is entitled to increase or decrease the quantity against any/all the items of the tender by not more than 20% while awarding the Rate Contract. As per clause 26, respondent No. 1-ONGC was permitted a maximum increase of 20% i.e. 82 M.T. and the aggregate 492 M.T. of Caustic Soda Flakes. The bid document clause 34 further states that the contract would be governed in accordance with the instructions contained in the bid document which included clause 26.

2.1(a) The learned counsel for the petitioner has relied on the tender notice particularly item No. 4 which provides quantity to be supplied and clause (iii) which provides rate contract will be concluded for a period of one year. He also referred to bid document of the tender. He also referred to the variation in quantity which provides that ONGC is entitled to increase or decrease the quantities against any / all the items of the tender by not more than 20% while awarding the rate contract. The bid document also provides that the contract against this tender will be governed in accordance with the above instructions to bidders and also general terms and conditions placed at Annexure-II. He has also referred to the salient feature of the tender document at Annexure-IV on page No. 53 which provides ex-works delivery of order upto 100 MT shall be completed within eight weeks from the date of placement of supply order. For higher order quantity, delivery period shall be increased by one week for each 12.5 M.T. or part thereof additional quantity ordered. He also referred to notes of the said tender agreement on page No. 59 that approximate annual requirement is 410 M.T. for all the four consignee projects. However, depending upon the actual requirement the quantity may be less or more than 410 M.T.

2.2 Respondent No. 1-ONGC had placed four supply

orders aggregating 393 M.T. of Caustic Soda Flakes (goods). The petitioner had supplied the same and received payment thereof from respondent No. 1. On 23.1.2001 the petitioner received a supply order from respondent No. 1 ONGC for supply of 48 M.T. of Caustic Soda Flakes but the petitioner had supplied only 17 M.T. of Caustic Soda Flakes and thereby the petitioner completed the supply of 410 M.T. i.e. the contract quantity. In so far as the balance 31 M.T. was concerned, respondent No. 1-ONGC informed the petitioner that the remaining 31 M.T. of Caustic Soda Flakes, a decision would be taken and communicated to the petitioner.

2.3 When the Annual Rate Contract was to come to an end on 3.3.2001, the petitioner received three supply orders from respondent No. 1 ONGC dated 19.2.2001 for 43 M.T., 24.2.2001 for 106 M.T. and 27.2.2001 for 80 M.T. aggregating in all to 229 M.T. of Caustic Soda Flakes. The delivery thereof was demanded by respondent No. 1-ONGC in April 2001, August 2001 and November 2001 respectively. As the petitioner had supplied 410 M.T. i.e. the contract quantity, the petitioner disputed the right of respondent No. 1-ONGC to demand further 229 M.T. (plus 31 M.T.) aggregating in all to 260 M.T. of Caustic Soda Flakes under the Annual Rate Contract. The petitioner vide letter dated 22.6.2001 requested respondent No. 1-ONGC to discharge /release the Performance Bank Guarantee.

2.4 As the petitioner received a caveat filed on behalf of respondent No. 1-ONGC wherein it was stated that ONGC had already called upon the respondent No. 2 Bank to remit the funds under the Performance Bank Guarantee, the petitioner has filed this Special Civil Application before this court on 6.7.2001.

3. When the matter was placed for hearing before this court on urgent basis on 6.7.2001, this court passed the following order:-

> "Heard Mr. A.S. Vakil, learned counsel for the petitioner and Mr. A.R. Mehta, learned advocate on behalf of the respondents. Looking to the urgency of the matter, the matter will be kept in the second sitting on Monday i.e. on 9.7.2001. In the meanwhile status quo as on today to be maintained. D.S. permitted."

4. When the matter ultimately reached hearing before this court on 9.7.2001, Mr. A.S. Vakil, learned advocate

for the petitioner made the following submissions:

4.1 The petitioner submitted that the advertisement/bid document /Annual Rate Contract never envisages the supply of 410 M.T. plus 269 M.T. of Caustic Soda Flakes to respondent No. 1-ONGC.

4.2 He further submitted that according to the petitioner, the advertisement/bid document/Annual Rate Contract was for the supply of 410 M.T. or a maximum of 492 M.T. of Caustic Soda Flakes. It may be noted that the Performance Bank Guarantee which was to be furnished by the petitioner was at the rate of 7.5% of the contract value. The contract value is 410 M.T. x Rs. 13380.64 ps.

4.3 It is further submitted that by placing purchase orders in February 2001 for supply of 229 M.T. to be delivered in April, August and November 2001, respondent No. 1 is trying to procure `today' Caustic Soda Flakes at `yesterday's price' for a future requirement i.e. much beyond the period of Annual Rate Contract. The Annual Rate Contract also contemplates the respondent No. 1-ONGC's `actual' requirements. The action of respondent No. 1-ONGC is therefore highly unreasonable and liable to be quashed. It has been submitted that respondent No. 1-ONGC has misled the petitioner in procuring the Performance Bank Guarantee by presenting that the requirement would not be more than 410 M.T. / 492 M.T. of Caustic Soda Flakes, whereas respondent No.1 has actually placed supply orders for almost 410 M.T. plus 269 M.T. of Caustic Soda Flakes.

4.4 The learned counsel for the petitioner has submitted that the respondent is "State" within the meaning of Article 12 of the Constitution of India and therefore when it had entered into a contract, the action of the respondent, even if in contractual matter can also be reviewed under Article 226 of the Constitution when there is violation of Article 14 of the Constitution. In support of the same, the learned counsel for the petitioner relies on the following decisions:-

1. R.D. SHETTY VS. INTERNATIONAL AIRPORT AUTHORITY reported in AIR 1979 SCA 1628. On page 1634 at para 7 the Hon'ble Supreme Court has observed thus:-

> "We must, in the circumstances, hold that, on a proper construction what paragraph (1) of the notice required was that only a person running a registered IInd Class hotel or restaurant and

having at least 5 years' experience as such should be eligible to submit a tender. This was a condition of eligibility and it is difficult to see how this condition could be said to be satisfied by any person who did not have five years' experience of running a IInd Class hotel or restaurant."

Again on page 1642 at para the Hon'ble Supreme Court was pleased to observed as follows:-

"Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with the same principle which meets the test of reason and relevance."

2. KUMARI SHRILEKHA VIDYARTHI VS. STATE OF U.P. reported in AIR 1991 SC 537. In this case at paras 20 and 21 on page 549 the Hon'ble Supreme Court has observed as under:

"Para 20 - We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist.

Para 21 - We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the Constitutional Scheme to accept the argument of exclusion of Art. 14 in contractual matters. The scope and permissible grounds of

judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion."

4.5 The learned counsel for the petitioner has also relied on the decision of this court in the case of NARMADA CEMENT COMPANY VS. STATE OF GUJARAT reported in 1997(1) G.L.H. 168.

4.6 Learned counsel for the petitioner has submitted that the respondent Corporation has entered into a contract. A government contract is a privilege or a largess. Unlike a private person who has freedom to decide with whom to contract and on what terms to contract, the government has to use its power of contracting in public interest. While deciding with whom to contract, it has to provide equal opportunities to all to compete for such a privilege. Government cannot select any body arbitrarily. In view of the judgement in the case of R.D. Shetty Vs. International Airport Authority (supra) and other decisions, this court has a limited jurisdiction to entertain this petition under Article 226 of the Constitution of India particularly when the respondent Corporation has acted outside the scope of the contract entered into between the parties and action of the respondent is clearly contrary to the contract, hence the present petition is maintainable.

5. On behalf of the respondent-ONGC Mr. A.R. Mehta submitted that so far as the Performance Bank Guarantee issued by the petitioner is concerned, the same was for due performance of the contract. The petitioner admittedly has refused to perform the contract of supplying the goods for which order had been placed before expiry of the rate contract. Once the order was placed before the expiry of the rate contract, the petitioner was duty bound to supply the goods and non-supply of goods tantamounts to a breach of the contract automatically entitling the respondent ONGC to invoke the Bank Guarantee since there was a non-performance of contract by the petitioner. He further submitted that the contract with regard to which the present petition is filed contains an arbitration clause for settling of disputes. In view of the same, the petitioner is not entitled to file the present petition and can only invoke the arbitration clause for any dispute. He submitted that the petitioner has not been able to make out any case as to how any breach of the petitioner's fundamental right is being committed by the respondent ONGC so as to entitle the petitioner to

invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. He has relied on the decision in the case of STATE OF U.P. AND OTHERS VS. BRIDGE & ROOF COMPANY (INDIA) LTD. reported in (1996) 6 SCC 22. In para 15 on page 30 the Hon'ble Supreme Court has observed as under:

> "In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e. in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D(1)."

Again in para 21 on pages 31-32, the Court further observed thus:

> "There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration (clause 67 of the contract). The arbitrators can decide both questions of fact as well as question of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction - was misconceived for the reasons mentioned supra."

5.1 The learned counsel for the respondent-ONGC has

further relied on the following decisions:

1. BAREILLY DEVELOPMENT AUTHORITY AND ANOTHER VS. AJAY PAL SINGH AND OTHERS reported in AIR 1989 SC 1076. On page 1083 at para 21 the Hon'ble Supreme Court has observed thus:

> "There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple."

2. RADHAKRISHNA AGARWAL VS. STATE OF BIHAR reported in AIR 1977 SC 1496.

3. THE DIVISIONAL FOREST OFFICER VS. BISHWANATH TEA CO. LTD. reported in AIR 1981 SC 1368.

5.2 He has further submitted that the petitioner has prayed for a writ of mandamus requiring the respondent to return the Performance Bank Guarantee and also for an order restraining the respondent ONGC from invoking the bank guarantee issued by respondent No. 2 for and on behalf of the petitioner. He further contended that the Hon'ble Supreme Court by a catena of judgements has specifically held that an injunction restraining invocation of bank guarantee can be granted only in cases of fraud and that too when the fraud has been committed while obtaining the guarantee. He submitted that there is absolutely no averment of fraud and it is not the petitioner's case that the bank guarantee has been obtained by respondent No. 1-ONGC fraudulently. In such circumstances, there does not and cannot arise any question of the petitioner being entitled to invoke the extraordinary jurisdiction of this court under Article 226 of the Constitution of India. In support of the same, he has relied on the decision of the Hon'ble Supreme Court in the cases of ANSAL ENGINEERING PROJECTS LTD. VS. TEHRI HYDRO DEVELOPMENT CORPORATION LTD. AND ANOTHER reported in (1996) 5 SCC 450 and also U.P. STATE SUGAR CORPN. VS. M/S. SUMAC INTERNATIONAL LTD.

6. This matter has been argued at admission stage. However, it has been argued on merit and therefore I decided to give reasons.

7.1 In my view the respondent is a `State' or in any

way an agency or instrumentality of the State. As per the contract when the respondent desires to obtain 410 M.T. of Caustic Soda Flakes (goods), the quantity can be increased by 20%. However, when the respondent-ONGC demands quantity of 229 M.T., the said action of respondent-ONGC is clearly outside the purview of the contract. This is an ultra vires power conferred under the contract and the respondent cannot demand the same by virtue of the contract. If the respondent desires to have such quantity i.e. 229 M.T. they ought to have entered into fresh contract. During the course of hearing it has been revealed that the price of Caustic Soda Flakes has been doubled and the respondent ONGC desires to take advantage of the contract to procure the goods.

7.2 In view of the judgement of the Hon'ble Supreme Court in the case of R.D. Shetty (supra) and other cases, this court has jurisdiction to entertain this petition under Article 226 of the Constitution and the writ petition filed by the petitioner is maintainable even in the realm of contractual obligations.

7.3 However, as regards invoking bank guarantee, as there are judgements of the Hon'ble Supreme Court, I do not give my express opinion in this regard but I may observe that there is an arbitration clause (29) on page 78 which provides arbitration (applicable in case of purchases upto rupees one crore. I, therefore, relegate the parties to arbitration proceedings and both the parties will enter into arbitration proceedings and thereafter arbitrator will be appointed and he will decide the dispute between the petitioner and the respondent. No order as to costs.

(K.M. MEHTA, J)

(pkn)

After pronouncement of the judgment, Mr.A.S.Vakil, learned advocate for the petitioner stated that if the court relegates the parties to arbitration proceeding as per the terms of the contract, it will take some time for appoint of an arbitrator. He further submitted that the bank guarantee which is given, is valid upto the year 2002 and the petitioner agrees and undertakes to keep that bank guarantee alive. He further submitted that in the meanwhile if the ONGC desires to invoke the bank guarantee the whole petition will become infructuous. Mr. A.R. Mehta, learned counsel for the petitioner has strongly objected to the same. In view of my finding that the action of the ONGC is ultra vires of the power conferred under the contract and in view of my

finding that the petition of the petitioner is maintainable even in the realm of contract, this court may not be able to grant blanket stay of invocation of bank guarantee. In view of the aforeaid judgement of teh Hon'ble Supreme Court, I am of the view that interest of the parties will be served if ONGC is restrained from invoking the bank guarantee till the arbitrator is appointed.

(K.M. Mehta, J.)